(2)

No. 02-1203

MAR 17
CLERK

In the

Supreme Court of the United States

October Term, 2002

◇

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v

SEAN DEON HUTCHINSON,

Respondent.

◇

On Petition for Writ of Certiorari to the Michigan Court of Appeals

◇

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The Respondent asks leave to file the attached answer in opposition to Petition for Certiorari without prepayment of costs and to proceed *in forma pauperis.*

Respondent has previously been granted leave to proceed *in forma pauperis* in the following courts:

- Wayne County Circuit Court
- Michigan Court of Appeals
- Michigan Supreme Court

Respondent's affidavit or declaration in support of this motion is attached hereto.

MARK J. KRIGER

33pp

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Shawn Hutchinson, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$1200.00	$N/A	$1200.00	$N/A
Self-employment	$0	$N/A	$0	$N/A
Income from real property (such as rental income)	$0	$N/A	$0	$N/A
Interest and dividends	$0	$N/A	$0	$N/A
Gifts	$0	$N/A	$0	$N/A
Alimony	$0	$N/A	$0	$N/A
Child Support	$0	$N/A	$0	$N/A
Retirement (such as social security, pensions, annuities, insurance)	$0	$N/A	$0	$N/A
Disability (such as social security, insurance payments)	$0	$N/A	$0	$N/A
Unemployment payments	$0	$N/A	$0	$N/A
Public-assistance (such as welfare)	$0	$N/A	$0	$N/A
Other (specify): _____	$0	$N/A	$0	$N/A
Total monthly income:	$1200.00	$N/A	$1200.00	$N/A

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
Doug's Lounge	10070 Chicago Blvd, Detroit	12/1/02 - present	$ 1200.00 /month
#Club007	7311 E. Outer Drive Detroit	11/99 - 11/02	$ 900.00 /month
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.) N/A

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
None		$	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings. N/A

☐ Home
Value _____

☐ Other real estate
Value _____

☐ Motor Vehicle #1 None
Year, make & model _____
Value _____

☐ Motor Vehicle #2
Year, make & model _____
Value _____

☐ Other assets None
Description _____
Value _____

6. State every person, business, or organization owing you or your spouse money, and the amount owed. N/A

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
_____	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support. ~~None~~

Name	Relationship	Age
Shaice Goodman	Daughter	11
Shawn Hutchinson, Jr.	Son	11
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ 465.00	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 100.00	$ N/A
Home maintenance (repairs and upkeep)	$ 0	$ N/A
Food	$ 250.00	$ N/A
Clothing	$ 50.00	$ N/A
Laundry and dry-cleaning	$ 20.00	$ N/A
Medical and dental expenses	$ 30.00	$ N/A

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 50.00	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ 50.00	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other:	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$ 0	$
Installment payments		
Motor Vehicle	$ 0	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other:	$ 0	$
Alimony, maintenance, and support paid to others	$ 180.00	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify):	$ 0	$
Total monthly expenses:	$ 1195.00	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 10, 2023

Shawn Hutchinson

(Signature)

No. 02-1203

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PEOPLE OF THE STATE OF MICHIGAN,

Petitioner,

v

SEAN DEON HUTCHINSON,

Respondent.

◇

On Petition for Writ of Certiorari to the Michigan Court of Appeals

◇

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI

◇

N.C. Deday LaRene
Mark J. Kriger*
LaRene & Kriger, P.L.C.
645 Griswold St., Suite 1717
Detroit, Michigan, 48226
(313) 967-0100; (fax) (313) 967-0199

* *Counsel of Record*

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COUNTER STATEMENT OF QUESTION PRESENTED FOR REVIEW

I. WHETHER THIS COURT SHOULD GRANT CERTIORARI WHERE THE MICHIGAN COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S ORDER GRANTING A NEW TRIAL ON THE GROUNDS THAT DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF TRIAL COUNSEL'S ADMITTED ACTUAL CONFLICT OF INTEREST THAT ADVERSELY AFFECTED HIS PERFORMANCE AND WHERE THE RECORD AMPLY SUPPORTED THE TRIAL COURT'S FINDINGS AND WHERE THE PURPORTED SPLIT BETWEEN THE CIRCUITS IS OF NO REAL SIGNIFICANCE TO SIXTH AMENDMENT JURISPRUDENCE?

COUNTER STATEMENT OF THE CASE

Respondent Shawn Hutchinson was charged by way of Information with possession with intent to deliver 650 grams or more of a mixture containing cocaine, in violation of MCL § 333.7401(2)(a)(i). He was represented at trial by attorney Thaddeus K. Dean. The case was tried by Wayne County Circuit Judge Louis F. Simmons, Jr., sitting without a jury.

According to the evidence at trial, on January 11, 1994, Respondent was driving a 1989 Black Toyota registered to one Leigh Harcourt, when Detroit police officers Robert Kane and James Schipper observed him run a stop sign at Sycamore and 12th Street in the City of Detroit, and attempted to effectuate a traffic stop. (Trial Transcript - hereinafter "TT" - pp. 5-7, 30). According to the officers, defendant did not initially stop but instead proceeded to Myrtle Street where he made a left turn on to 15th Street, and pulled into a driveway of what appeared to be a vacant dwelling. (TT, 7-8). Respondent was unable to produce a driver's license and as a result, was placed under arrest. (TT, 9-10). Officer Kane then looked inside defendant's vehicle and seized a plastic bag on the floor board of the vehicle; inside the bag were clear plastic bags containing the cocaine on which the prosecution was based. (TT, 10-13).

Respondent testified that he worked for Michael Williams, the owner of the B&B Car Wash in the City of Detroit, doing odd jobs and running errands for Mr. Williams. (TT, 44-45). He also stated that he knew Ms. Harcourt and that Ms. Harcourt was Mr. Williams's girlfriend. (TT, 46). According to Respondent, on the morning in question, Mr. Williams asked him to go to Mr. Williams's mother's house located on 15th Street, because, although the house had been boarded up

for two to three years, it had been broken into and stripped. (TT, 47-48). Respondent testified that while on his way to Mr. Williams's mother's house, he noticed the police were behind him but he did not realize the officers were trying to stop him and was not attempting to elude them. (TT, 48). He also denied that the police activated their lights or had blown their horn in an effort to have him stop. (TT, 61).

Respondent testified that he had never before seen the plastic bag in which the drugs were found, and that he was unaware of the fact that the bag contained cocaine. (TT, 51-52). He said that he did not tell the police about Mr. Williams or Ms. Harcourt because he had never been in trouble before and was worried that if he told the police about Mr. Williams or Ms. Harcourt there would be "repercussions behind it . . . I didn't know if my life was in danger or not." (TT, 64).

At the conclusion of the trial, Judge Simmons announced that he was convicting the Respondent of simple possession of 650 grams or more of a mixture containing cocaine. At the time of sentencing, however, he stated that he had intended to convict Respondent of attempted possession of 650 grams or more of a mixture containing cocaine only, and amended his verdict to so reflect, imposing the maximum sentence permissible under such a conviction, 40 to 60 months imprisonment.

The prosecution appealed the verdict and sentence and the Court of Appeals reversed and remanded for reinstatement of the original verdict of guilty of possession of 650 grams or more of cocaine and for resentencing. On remand, Respondent filed a Motion for New Trial, which Judge Simmons granted on the basis that a miscarriage of justice had occurred.

The prosecution again appealed and the Court of Appeals again reversed and remanded for reinstatement of the original verdict of guilty of possession of 650 grams or more of a mixture containing cocaine and for resentencing before a different judge.

Following the denial of leave to appeal by the Michigan Supreme Court, Respondent filed in the trial court a pleading entitled, "Defendant's Motion to Bar Resentencing Based upon Double Jeopardy" as well as a pleading entitled, "Defendant's Alternative Motion for a New Trial", in which he argued, *inter alia,* that he was entitled to a new trial based upon newly discovered evidence.

More specifically, the latter motion alleged that counsel had learned that in February of 1995, two federal search warrants were executed in furtherance of an investigation involving Michael Williams. One warrant was executed at Mr. Williams's apartment and the other at Mr. Williams's car wash. During the execution of the warrant at Mr. Williams's apartment, two kilos of cocaine were seized. During the execution of the search warrant at the car wash, DEA agents seized a half kilo of cocaine, $10,000 in US currency, and drug records. Williams ultimately agreed to cooperate with the authorities, entered a guilty plea to a tax violation, and served a short sentence. Following up on this information, the motion stated, counsel approached Michael Williams, who acknowledged that Mr. Hutchinson was not involved in drug trafficking, and did not indeed know about the cocaine found in the car he was driving on January 11, 1994.

Glenn McCandliss, the lawyer who filed the motion sought, and was granted, leave to withdraw, so he might be able to offer testimony regarding the statements made to him by Williams.[1]

---

[1] In his testimony, Mr. McCandliss described his conversation with Michael Williams as follows:

(continued...)

[1](...continued)
(By Mr. Larene, continuing): The questions you asked him, the answers he gave you?

A. I asked him whether or not -- I said I need to know whether or not Shawn Hutchinson knew the drugs -- that there were drugs in the car in which he was driving.

Q. Did you do anything to establish in your conversation with Mr. Williams what drugs and what car you were talking about?

A. I did.

Q. How did you do that?

A. I said that -- I said that I understand that Shawn -- I said Shawn Hutchinson was pulled over in a car that was apparently registered to your girl friend, and I understand that Shawn Hutchinson was arrested in 1994. And he said that's right. And I said and there were drugs seized from that car and what I need to know is whether or not -- and my question was sort of a long question to him. I said my question clearly "I need to know whether or not Shawn Hutchinson knew there were drugs in the car, in the 1989 black Toyota in which he was driving back in January 1994. And he said no he did not know.

Q. Did you ask him another question after that?

A. I did. I asked him would Shawn Hutchinson have known about those drugs in that 1989 Toyota when he drove it on January 1994.

Q. What did he say?

A. He said no he would not have known about those drugs. Did -- to the best of your recollection, did Mr. Williams in the course of your conversation with him say anything about his own anything he might have had to do with those drugs?

A. All he told me that Shawn Hutchinson didn't have anything to do with it.

Q. Did he say anything about him, Michael Williams, having anything to do with them?

A. Other than the fact that he knew, acknowledged exactly what I was talking about. And I was making statements like, you know, your girl friend's car and your drugs and his, statements to that affect.

(continued...)

Accordingly, undersigned counsel began to represent Respondent. Undersigned counsel did not pursue the former jeopardy motion, but instead filed a supplement to the motion for a new trial, on the basis that Thaddeus Dean, Respondent's trial lawyer, also, and simultaneously, represented Michael Williams, Respondent's boss, and the person who, according to Respondent, actually possessed the cocaine which is the basis of the instant prosecution.

At the hearing on the motion, Mr. Dean admitted that his concurrent representation of Michael O'Neal Williams created an actual conflict of interest, and explained how that conflict in fact burdened his representation of Shawn Hutchinson:

> Q. At all times when you represented Shawn Hutchinson you considered Michael Williams to be your client?
>
> A. Yes.
>
> Q. You felt -- did you feel that you had a duty and loyalty to Michael Williams and to protecting his interest?
>
> A. Yes.
>
> Q. Did the fact that you had this feeling of loyalty and obligation to Michael Williams as your client keep you from doing anything in your representation of Shawn Hutchinson?
>
> A. I'd say yes.

---

[1](...continued)

> Q. You referred to the drugs as his drugs?
>
> A. I believe he did.
>
> Q. He did or you did?
>
> A. He did. I asked him -- I asked him about these drugs as his drugs and he said yes.

(Transcript, 2/22/01, pp. 25-27).

Q. Please explain what that might have been.

A. Well during say, for instance, my representation of Mike Williams, there were negotiations which went forth in an effort to undercut the seriousness of his situation and was resolved through cooperation. That was never -- that opportunity was never afforded Shawn Hutchinson.

Q. What do you mean?

A. I never suggested to Shawn that he could possibly seek a resolution of the charges against him by becoming an informant for the government.

Q. Did you ever approach anybody in either the federal or state prosecutive authorities and ask if there was any interest in having Shawn Hutchinson become an informant or witness or operative against Michael Williams?

A. No.

Q. And it was because of your duty to your client Michael Williams?

A. Yes.

Q. There was a year about that went by from between the time of Michael -- of Shawn Hutchinson's arrest and the time of Michael Williams' arrest, right?

A. Yes.

Q. During that period of time, were you aware of the fact that there was a federal investigation of Michael Williams and federal interest in Michael Williams, alleged or suspected drug trafficking?

A. Yes.

Q. And that would have been a time in which you, had you not felt that you owed a duty to protect Michael Williams your client's interest, that it would have been appropriate for you to approach either the state authorities or at least the federal authorities to see if they could -- you could gain leniency for Mr. Hutchinson as a result of his help in their investigation of Michael Williams?

A. There would have been time to do that, yeah.

Q. Now Michael -- excuse me. Shawn Hutchinson testified in his own defense, correct?

A. Correct.

Q. And he said in his trial under oath that he didn't know anything about drug trafficking at the B & B Car wash, correct? That he was an innocent naive?

A. I think so, yes.

Q. If in fact Michael -- excuse me -- Shawn Hutchinson didn't know anything or maintained that he didn't know anything about Michael Williams, how could he have done himself any good?

A. Shawn, in my opinion, was close enough to Mike Williams where he could have provided information. He could have recorded conversations. He could have recorded phone calls. He could have probably done --

Q. Could have drawn information from Mr. Williams?

MR. SIMON [Assistant Prosecuting Attorney]: Judge, I know there could have been lots of objections. I just have to object as being leading cause I don't want to waste any time. But we are getting a little bit far over the edge now.

MR. LARENE: I agree and I apologize.

Q. (By Mr. Larene, continuing): I'm sorry. Please continue.

A. He could have gotten information. He could have worn a body mike. I mean there is a lot of things that he could have done conceivably to gather information. He could have stuck his ear to the door.

There was an office which divided the car wash generally where Shawn was from the office area of the building. And I am sure Shawn could have hung around that door and listened for stuff if he had been motivated to do so.

Q. You never suggested it?

A. No, no.

(Transcript, 2/22/01, pp. 63-67).

Respondent testified that if he had been "afforded the opportunity" to cooperate with the authorities in order to exonerate himself, or to gain some measure of leniency, he would have been willing to do so, and that, in his estimation, such efforts would likely have been fruitful:

Q. Now in the course of your representation -- or strike that.

In the course of Mr. Dean's representation in this case, did he ever indicate to you in any way, shape, manner or form that one option you would have would be to cooperate with the police against Mr. Williams?

A. No, he never afforded me that opportunity.

MR. KRIGER: One moment, Your Honor.

(By Mr. Kriger, continuing): Now did Mr. Dean suggest a course of action relative to how this case should proceed?

A. He just told me that we were going to take a bench trial in front of Judge Simmons and that that would be the best way for us to see ourselves winning the case.

Q. And did you rely on that advice?

A. Yes, I did.

Q. Had Mr. Dean suggested to you that one option would have been to cooperate in return for lesser charges or maybe even a dismissal, would have that been an option that you would have liked to have explored?

A. Mr. Kriger, I was looking at life in prison for a person who have never committed a crime in his life.

So I would have been available -- I would have been open for any options that would have been afforded to me,

Q. Would have you been willing to wear a microphone or a wire to record conversations with Mr. Williams?

A. As I said, again I would have been willing to do whatever it took to save myself, sir.

Q. Would have you been willing to record telephone conversations with Mr. Williams?

A. Yes.

Q. Okay. You had testified at trial that you were unaware of the fact that Mr. Williams was involved in cocaine when you were working at the car wash; is that correct?

A. Yes. From what I knew, he didn't deal in cocaine.

Q. Okay.

A. From my knowledge.

Q. Until you were arrested?

A. Right.

Q. When you were arrested with two kilos of cocaine in the car, did your opinion about Mr. Williams and his involvement in cocaine change at that point?

A. Most definitely.

Q. You felt he was responsible for that?

A. Yes.

Q. Now if you had been willing to record telephone conversations or speak, do you think Mr. Williams would have been willing to even talk about the cocaine?

A. I'm sure he would have.

Q. Why do you say that?

A. Cause obviously it was his loss and not mine.

Q. All right. Did he have any conversation with you which indicated that he was taking responsibility for this cocaine when you called him from the station house?

A. No, other than him being apologetic of what took place.

Q. When he apologized to you, what did you take that to mean?

A. I took that to mean that he knew exactly what was in the vehicle.

(Transcript, 4/11/01, pp. 8-10).

The Hon. Carole F. Youngblood, Wayne County Circuit Judge, to whom the case was reassigned on the second remand by the Court of Appeals, held that trial counsel's admitted active conflict of interest adversely affected his representation of Shawn Hutchinson, and required the grant of a new trial:

> A claim of ineffective assistance of counsel is analyzed by the court applying a two-pronged test. Strickland [v Washington, 466 US 668, 80 L Ed 2d 674, 104 S Ct 2052 (1984)];People v Stanaway, 446 Mich 643, 521 NW2d 557 (1994); People v Rhinehart, 149 Mich App 172 (1986). A defendant must show (1) his counsel's performance was deficient and (2) this performance prejudiced the defense depriving the defendant of a fair trial. Strickland, supra; Hall [v United States,] 200 F3d [962,] 965 [6th Cir. 2000)].
>
> When the claim is based on an actual conflict of interest, the standard is different. Hall, supra; Rhinehart, supra; People v Simmons, 134 Mich App 779, 788, 352 NW2d 275 (1984). When an actual conflict of interest exists, prejudice is presumed. Hall, supra. Where it is demonstrated that an attorney made a choice which was helpful to one client and harmful to the other, an actual conflict of interest is demonstrated. United States v Mers, 701 F2d 1321, 1328 (11th Cir. 1983).
>
> The prosecution's argument that the defendant's failure to object to the conflict of interest at trial requires him to establish that the actual conflict of interest adversely affected his defense is without merit. There is no evidence that the defendant had any knowledge that a conflict of interest existed or that he had any reason to suspect such a conflict. In addition, the defendant has clearly demonstrated that Mr. Dean's disloyalty and breach of his duties did affect his defense.
>
> Here an actual conflict of interest did exist based on Mr. Dean's representation of the defendant and Michael Williams at the same time and over the same subject matter. Mr. Dean admitted that this representation of Mr. Hutchinson was compromised based on his representation of Mr. Williams. He admitted that he

failed to pursue negotiations with the prosecutor based on his representation of Mr. Williams.

Mr. Dean had represented Michael Williams prior to the date of the defendant's arrest on drug related matters. Mr. Dean knew that there was a pending federal investigation of Michael Williams for drug trafficking while he was representing Mr. Hutchinson. Mr. Dean knew that the drugs which Mr. Hutchinson was charged with possessing were found in Mr. Williams' car. Mr. Dean knew that the defendant was driving that car at the direction of Mr. Williams to do an errand. Clearly Mr. Dean always knew that the drugs found in that car belonged to Mr. Williams and that Mr. Hutchinson was actually innocent.

Mr. Dean failed to bring forth any of this information at Mr. Hutchinson's trial. He failed to call witnesses that could corroborate that Mr. Williams owned the car, that the defendant worked at the car wash doing only car-wash related activities, that several employees of the car wash drove the car to do errands for Mr. Williams, and that Mr. Hutchinson was a person who lived paycheck-to-paycheck and was not associated with any, drug-related activities. Clearly Mr. Dean failed to call such witnesses and put forth such information about Mr. Williams because Mr. Williams was his client and paying for Mr. Hutchinson's defense.

It is difficult to imagine a clearer conflict of interest. The interests of Mr. Hutchinson and Mr. Williams could not have been more in conflict. This court is not aware of a more obvious and extreme example of an actual conflict of interest. Cuyler v Sullivan, 446 US 335, 350 (1980); United States v Christakis, 238 F.3d 1164, 1170-71 (9th Cir. 2001).

Once a defendant shows an actual conflict of interest, he need not demonstrate actual prejudice. Cuyler v Sullivan, supra, Mickens v Taylor, 227 F.3d 203, 219 (4th Cir. 2000). However, here the defendant has shown substantial and real prejudice. Mr. Dean breached his most basic duty of loyalty to Mr. Hutchinson. This breach of loyalty began the moment he entered a courtroom on behalf of Mr. Hutchinson and continued throughout his pretrial failure to negotiate on behalf of Mr. Hutchinson and his failure to provide Mr. Hutchinson with an adequate defense at trial.

(Opinion, November 13, 2001, pp. 7-10).

Judge Youngblood also granted the Motion for New Trial on the issue of newly discovered evidence. The Court of Appeals granted the prosecution's Application for Leave to Appeal, and, in an unpublished opinion, reversed the trial court on the newly-discovered evidence issue, but upheld

the grant of a new trial on the basis of trial counsel's conflict of interest. In this regard, the Court of Appeals held:

> The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* To prove a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).
>
> However, when claiming ineffective assistance due to defense counsel's conflict of interest, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). In other words, the defendant bears the burden of demonstrating "that counsel 'actively represented conflicting interests' and that an actual conflict of interest adversely affected his lawyer's performance." Id. at 557, quoting *Cuyler v Sullivan*, 446 US 335, 348-350; 110 S Ct 1708; 64 L Ed 2d 333 (1980). Although this heightened standard is not a rule of prejudice per se, an actual conflict of interest that adversely affects the adequacy of a lawyer's performance is presumptively *prejudicial. Cuyler, supra*; *Smith, supra* at 556-557.
>
> A. Active Representation of Conflicting Interests
>
> "An attorney has an actual, as opposed to a potential, conflict of interest when, during the course of the representation, the attorney's and defendant's interests 'diverge with respect to a material factual or legal issue or to a course of action.'" *Winkler v Keane*, 7 F3d 304, 307 (CA 2,1993), quoting *Cuyler,* 446 US at 356 n 3. We conclude, from our review of the record, that an actual conflict of interest existed in this case.
>
> Defendant was represented by attorney Thaddeus Dean from the time of his arraignment in January 1994 through the time of sentencing in April 1996. Dean also represented defendant's employer, Michael Williams, and the record suggests that Dean had an ongoing attorney-client relationship with Williams' that began several years before defendant's arrest in this case. In fact, Dean continued to represent Williams through the evidentiary hearing held in this case on March 30, 2001. Defendant worked at Williams' car wash, where he washed cars and ran various errands for Williams. On the day of his arrest, defendant was allegedly running an errand for Williams, driving a car provided by Williams, used by car wash

employees, and kept at the car wash, when he was stopped by police for a traffic violation. During a search of the car, the police found over 650 grams of cocaine under the passenger seat.

Importantly, it was Williams who retained Dean, Williams' own personal lawyer, to represent defendant. At some point after defendant's arrest, Williams informed Dean that he was the subject of a federal investigation involving drug trafficking. About one year after defendant's arrest and approximately four months prior to defendant's trial, Williams was arrested by federal agents on drug charges, stemming from a search of Williams' car wash and apartment that resulted in the seizure of 2.5 kilograms of cocaine and $175,000 cash. Dean represented Williams in the federal prosecution that ensued and which was resolved by way of a plea bargain. Williams' plea bargain occurred before the commencement of defendant's trial.

These facts as found by the circuit court establish that Dean had a vested interest in protecting Williams while he was also representing defendant. Because Williams' was also Dean's client, Dean had an interest in protecting Williams from being implicated in any further drug charges. See *United States v Christakis*, 238 F3d 1164, 1169 (CA 9, 2001) (active conflict found where attorney continued to represent an unindicted co-conspirator during the representation of the defendant for conspiracy to distribute cocaine). Indeed, Dean admitted that a conflict of interest existed during the pretrial proceedings of defendant's case due to his loyalty to Williams. Thus, the nature of the conflict was acknowledged by Dean himself, who as the attorney for defendant, is "perhaps the best judge of whether a conflict existed." *Baty v Balkcom,* 661 F2d 391, 397 (CA 5, 1981). In fact, an attorney representing two defendants in criminal matters is in the best position professionally and ethically to determine when a conflict of interests exists or will develop. *Id.* at 397 n 11 (citations omitted). Accordingly, we find the circuit court did not clearly err in determining that Dean actively represented conflicting interests during the pretrial phase of this case.

B. Adverse Effect

With that established, the critical question becomes whether this conflict of interest adversely affected Dean's performance. To establish that a conflict of interest adversely affected counsel's performance, a defendant "need only show that some effect on counsel's handling of particular aspects of the trial was 'likely.'" *Christakis, supra* at 1170 (citations omitted). A defendant must demonstrate that some plausible alternative defense strategy or tactic *might have been pursued,* and that the alternative strategy was inherently in conflict with or not undertaken due to the attorney's other loyalties. *Perillo v Johnson,* 79 F3d 441, 448-450 (CA 5, 1996);*United States v*

Malpiedi, 62 F3d 465, 469 (CA 2, 1995); *Winkler, supra* at 309. Under this test, the "defendant need not show that the defense [or foregone tactic] would necessarily have been successful if it had been used, but that it possessed sufficient substance to be a viable alternative." *Id.*

Contrary to the prosecution's argument, this test does not require defendant to show that the alternative tactic not pursued by conflicted counsel was reasonable or that it affected the outcome of the trial. *Malpiedi, supra;* see also *Perillo, supra.* A showing of prejudice is simply not required. *Christakis, supra* at 1170. See also *Cuyler, supra.* Rather, in cases of joint representation of conflicting interests, the evil is in what the attorney finds himself compelled to refrain from doing, not only at trial but also as to pretrial plea negotiations. *Christakis,* supra, quoting *Holloway v Arkansas*, 435 US 475, 490; 98 S Ct 1173; 55 L Ed 2d 426 (1978). Indeed,"[p]lea bargains are perhaps the most obvious example of the manifest effects of a conflict of interest at pretrial proceedings." *Baty, supra* at 397 n 12.

With these principles in mind, we find that defendant established that seeking a plea bargain in exchange for defendant's cooperation was a plausible alternative tactic that was not pursued due to Dean's admitted conflict of interest. Defendant testified that he would have done anything to save himself. In light of defendant's testimony, and the fact that defendant was facing a mandatory life sentence if convicted, we believe that defendant established that he at least might have pursued plea negotiations had Dean raised the issue. Again, while we cannot predict whether such a tactic would have been successful, the outcome is not *determinative. Perillo, supra* at 449.

Second, we find that the trial court's factual finding that Dean's actual conflict influenced his decision not to advise defendant to consider plea negotiations was not a clear error. During the evidentiary hearing, Dean testified that he believed his simultaneous representation of Williams and defendant undermined his representation of defendant during pretrial proceedings in that Dean did not suggest to defendant that he consider cooperating with the authorities as an informant to gain information against Williams in exchange for a reduced plea, nor did Dean pursue such an option with the prosecution. Dean expressly admitted that his representation of Williams adversely affected his representation of defendant in that regard. The trial court was in a superior position to judge Dean's credibility and found his testimony credible with regard to whether Dean's advocacy of defendant was adversely affected by Dean's representation of Williams. We are satisfied that a plea offer might have been pursued in this case, but was not undertaken due to Dean's loyalties to Williams. See *Malpiedi, supra.* Ultimately, Dean's simultaneous representation of defendant and Williams foreclosed viable options, and as a result, defendant was adversely affected. Therefore, we hold that Dean's failure to explore the possibility of plea negotiations on behalf of defendant due to his loyalty to

Williams denied defendant the Sixth Amendment right to the effective assistance of counsel.

(Michigan Court of Appeals, Slip Opinion, pp. 2-5) (footnotes omitted).

REASON FOR DENYING THE WRIT

I. THIS COURT SHOULD DENY CERTIORARI WHERE THE MICHIGAN COURT OF APPEALS CORRECTLY AFFIRMED THE TRIAL COURT'S ORDER GRANTING A NEW TRIAL ON THE GROUNDS THAT DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF TRIAL COUNSEL'S ADMITTED ACTUAL CONFLICT OF INTEREST THAT ADVERSELY AFFECTED HIS PERFORMANCE, WHERE THE RECORD AMPLY SUPPORTED THE TRIAL COURT'S FINDINGS, AND WHERE THE PURPORTED SPLIT BETWEEN THE CIRCUITS IS OF NO REAL SIGNIFICANCE TO SIXTH AMENDMENT JURISPRUDENCE.

The basic constitutional rule is clear, and the prosecution does not claim that either of the courts below erred in stating it: "'prejudice is presumed when counsel is burdened by an actual conflict of interest,' although in such a case we do require the defendant to show that the conflict adversely affected his counsel's performance." *Smith v Robbins,* 528 US 259, 287 (2000) (quoting *Strickland v Washington*, 466 US 668, 692 (1984).[2] The prosecution, however, seizes upon a single sentence from the Michigan Court of Appeals' opinion which it claims demonstrates that the panel was required to choose between divergent definitions of the phrase "adversely affected," chose the wrong one, and was thus led to an improper result.

Respondent maintains however, that the purported doctrinal split is of no real significance, either to Sixth Amendment jurisprudence, or to the result in this case, and that there is simply no

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[2] This is, of course, a slightly different rule than that applied where a claim of ineffective assistance is based on counsel's deficient performance. There prejudice must be shown; that is, a reasonable probability that but for counsel's unprofessional conduct, the result of the proceeding would have been different. *Strickland v Washington, supra*, at 689 (1984).

basis for this Court to conclude that the decision of the Michigan Court of Appeals is either erroneous, or otherwise in need of correction.

In *Cuyler v Sullivan,* 446 US 335, 349-350 (1980), this Court held that "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief." As this Court later explained in *Strickland v Washington, supra,* "[i]n those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties," and a presumption of prejudice is appropriate because "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests." *Id.,* at 692.

The prosecution calls upon this Court to resolve what it describes as "an apparent split in the Federal Courts of Appeal over the meaning or practical application of the [*Cuyler v Sullivan*] test." The purported "circuit split" upon which the prosecution premises its Petition only applies to one species of active conflict cases: where the fact that a lawyer representing "actively conflicting interests"[3] (as defendant's trial counsel here admittedly was) fails to pursue a course of action (as defendant's trial counsel here admittedly did).

All the federal cases hold that a defendant must show that "some plausible alternative defense strategy or tactic might have been pursued, and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests." *United States v Malpiedi,* 62 F3d 465, 469 (2nd Cir. 1995), *cert denied,* 521 US 1111 (internal quotation marks and citations omitted); *Mickens v Taylor,* 240 F3d 348, 361 (4th Cir. 2001), *affirmed on other grounds,* ___ US

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[3] *Cuyler v Sullivan, supra,* at 350.

___; 122 SCt. 1237; 152 LEd 2d 291 (2002); *Freund v Butterworth*, 165 F3d 839, 860 (11th Cir. 1999); *Perillo v Johnson*, 79 F3d 441, 448-450 (5th Cir. 1996); *Church v Sullivan*, 942 F2d 1501, 1512 (10th Cir.1991); *United States v Fahey*, 769 F2d 829, 836 (1st Cir. 1985). Some of these courts have added the gloss that the alternative strategy or tactic must be shown to have been "reasonable." *Mickens v Taylor, supra*; *Freund v Butterworth, supra*. All courts agree, however, that the defendant need not show that pursuit of the unpursued option would have changed the outcome of the proceedings.

Whatever the difference between "plausible" and "plausible and reasonable" - the two concepts do not seem all that different[4] - the prosecution's argument that the pursuit of a cooperation was not "reasonable" flies in the face of the record and the law. As the Michigan Court of Appeals noted, the defendant "was facing a mandatory life sentence if convicted," and in light of his testimony to the effect that he "would have done anything to save himself" the Court's conclusion that he "established that he at least might have pursued plea negotiations" unexceptionable, and the pursuit of such an attempt eminently "reasonable" under any view. Moreover, the trial court's findings that "Mr. Dean failed to call witnesses that could corroborate that Mr. Williams owned the car wash, that the defendant worked at the car wash doing only car wash related activities, that several employees of the car wash drove the car to do errands for Mr. Williams, and that defendant lived pay check to paycheck and was not associated with any drug activities" were amply supported

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[4] This Court has not yet seem to have found the distinction so significant as to require the grant of *certiorari* to resolve any such conflict although it has had the opportunity to do so. This Court has, however, in a case with a fact pattern analytically similar to the one at bar, noted that if "counsel was influenced in his basic strategic decisions by the interests of the employer who hired him" to represent employee-defendants, " the due process rights of [the employees] were not respected. *Wood v Georgia*, 450 US 261, 272 (1981).

by the record. Likewise, trial court's finding, based on trial counsel's own admission, that he failed to pursue plea negotiations because of his admitted concurrent representation of Mr. Williams who at the time was under investigation by the federal authorities for drug trafficking is amply supported by the record.

It is well established that "a federal appellate court may set aside a trial court's findings of fact only if they are 'clearly erroneous,' and that it must give 'due regard ... to the opportunity of the trial court to judge of the credibility of the witnesses.'" *Amadeo v Zant*, 486 US 214, 223 (1988). In applying this standard, this Court has stated that "we, like any reviewing court, will not reverse a lower court's finding of fact simply because we 'would have decided the case differently.' Rather, a reviewing court must ask whether, 'on the entire evidence,' it is 'left with the definite and firm conviction that a mistake has been committed.'" *Easley v Cromartie*, 532 US 234, 242 (2001). Based on the trial court record, it simply cannot be seriously argued that the trial judge's findings were clearly erroneous.

In any event, the Michigan Court of Appeals' conclusion that "while we cannot predict whether such a tactic would have been successful, the outcome is not determinative" (Slip Opinion, p. 4), is in exact accord with the federal decisions. *See, e.g., United States v Christakis*, 238 F3d 1164, 1170-1171 (9th Cir. 2001) ("Christakis need not demonstrate that the government would have reduced his sentence if he had provided information implicating DiCesare. Rather, he need only show that Sherman's interest in protecting DiCesare likely affected his decision not to advise Christakis to consider pursuing a deal with the government.")

In support of its "unreasonableness" position, the prosecution advances the same arguments it did to the trial court (post-hearing Memorandum, pp. 37-39) and the Court of Appeals (Brief on

Appeal, pp. 30-33): that defendant's potential offered cooperation was inconsistent with his post-arrest statement that he was unemployed (Petition for Certiorari, p. 28),[5] that there was good reason for trial counsel "not to suggest to Defendant that he try to provide information about Williams, which had nothing to do with the fact that Dean was also representing Williams" (Petition for Certiorari, pp. 28), and that it is "rather inconceivable," and inconsistent with defendant's trial testimony that he and Williams had fallen out, that he could have really gathered information. (Petition for Certiorari, pp. 29). However, the prosecution gives the Court no basis upon which it might conclude that the rejection of these arguments by the courts below was "clearly erroneous."

It will be recalled that the defendant Hutchinson testified that he was "sure" that Michael Williams would have made incriminating statements to him (Transcript, 4/11/01, pp. 9-10), and that Thaddeus Dean, who obviously knew both men, was of the opinion that the defendant "was close enough to Mike Williams where he could have provided information" in a variety of ways, from wearing a microphone, to "hanging around" Williams's office door. (Transcript, 2/22/01, pp. 66-67). The trial judge did not reject that testimony, nor did the Court of Appeals, and the prosecution offers

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[5] The prosecution also suggests here in passing that the conflict of interest claim could have been deemed waived by the failure to present it in defendant's first motion for new trial. The Court of Appeals held this argument to itself have been forfeited by its cursory presentation by the prosecution. (Slip Opinion, p. 2, n. 3). In any event, the case which the prosecution cited, and cites, in support of its position, *United States v Reed*, 179 F3d 622, 625-626 (8th Cir.1999), is simply inapposite. There, the court upheld a finding of waiver on the basis that the defendant "concealed" the conflict from the court, repeatedly expressing his satisfaction with counsel, and personally rejecting a government offer to cooperate against the fee-paying coconspirator. Not only are the facts of *Reed* markedly different from those of the case at bar, the defendant Hutchinson explained his acquiescence in Mr. Dean's conflicted representation because he could not afford to hire his own lawyer, and had heard bad things about court-appointed attorneys; he was, as he said at one point, "brand new to this." (Transcript, 4/11/01, pp. 10, 13, 20, 24-25). This is hardly the stuff of which waiver of the most basic Sixth Amendment protections is made.

no reason for this Court to do so. Whether or not Mr. Hutchinson's efforts to gather information would have been ultimately successful is not, of course, the question.[6]

As to the suggestion that there may have been other reasons not to suggest cooperation, the simple, and conclusive, answer is that Mr. Dean's testimony - credited by the trial judge, and the Court of Appeals - makes clear that it was an actual conflict of interest, not strategic considerations, which kept him from pursuing this course. The prosecution's argument that if Hutchinson did cooperate, Williams might have been spurred to give information against him borders on the absurd. Mr. Williams did not begin cooperating with the authorities for more than a year following Mr. Hutchinson's arrest. Moreover, Williams's statements to Mr. Hutchinson's appellate attorney, Glen McCandliss, suggest that Mr. Hutchinson was simply not involved in Williams's drug trafficking. And even if he were, is it "reasonable" to suggest that the authorities would have been interested in turning the whale against the minnow?

As to defendant's trial testimony regarding his falling out with Williams, for some reason the prosecution did not see fit to confront Mr. Hutchinson on this issue at the evidentiary hearing, so he was unable to explain it. However, logic and common sense suggest that a person who wished to exploit another's confidence, in order to secure damaging admissions, might well avoid such a "falling out," or act as if he wanted to make amends. And, as noted above, both Mr. Hutchinson

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[6] The prosecution's suggestion (Petition for Certiorari, p. 32) that law enforcement authorities - who were already investigating Williams - would not have been interested in hearing from the defendant, who was found driving a car registered to Williams's girlfriend, and containing almost a kilogram of cocaine, simply because he had denied working for Williams following his arrest assumes a degree of naivete on the part of the narcotics investigators which is simply inconsistent with human experience. Moreover, even if the police had been skeptical of Hutchinson's ability to produce, what would it have cost them to let him try?

and Mr. Dean testified at the evidentiary hearing that, given their knowledge of the relationship between Hutchinson and Williams, it was likely that Hutchinson could have obtained incriminating evidence, either directly or surreptitiously, the trial judge accepted that testimony, the Court of Appeals did not disturb those findings, and the prosecution offers no reasoned basis to set them aside.

Finally, Petitioner does not even address, let alone offer an explanation of why, the trial court's findings that "Mr. Dean failed to call witnesses that could corroborate that Mr. Williams owned the car wash, that the defendant worked at the car wash doing only car wash related activities, that several employees of the car wash drove the car to do errands for Mr. Williams, and that defendant lived pay check to paycheck and was not associated with any drug activities" were unreasonable.[7]

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[7] While Petitioner states that "Respondent's conflict of interest claim did not pertain to anything that occurred at trial . . ." (Petition for Writ of Certiorari, p. 28), it is clear that the trial court found otherwise.

SUMMARY AND RELIEF REQUESTED

The Petitioner's Petition for Writ of Certiorari does not even remotely approach the kind of showing required to invoke this Court's discretionary jurisdiction under Supreme Court Rule 10. Accordingly, the Court should deny the Petition for Certiorari.

Respectfully submitted,

LARENE & KRIGER, PLC

Attorneys for Respondent
Penobscot Building
645 Griswold Street, Suite 1717
Detroit, Michigan 48226
(313) 967-0100

BY: _____
N. C. DEDAY LARENE (P16420)

BY: _____
MARK J. KRIGER (P30298)

DATED: March 12, 2003